



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
CIVIL RIGHTS

June 6, 2016

Mr. James MacDonald

Email: (b)(6) Privacy, (b)(7)(C) Enf. Privacy

(b)(6) Privacy, (b)(7)(C) Enf. Privacy

Re: EPA File No. 02R-00-R9

Dear Mr. MacDonald:

This letter is to advise you that the U.S. Environmental Protection Agency's (EPA) Office of Civil Rights (OCR) is resolving the complaint filed on April 17, 2000, by you as a Trustee of the Pittsburg Unified School District, Michael Boyd on behalf of Californians for Renewable Energy, and Community Health First, under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI), and EPA's implementing regulations at 40 C.F.R. Part 7.¹ The complaint alleged discrimination based on race and national origin in violation of Title VI relating to the permitting of two natural gas-fired power plants in the city of Pittsburg, California. Specifically, Complainants alleged that actions by the California Air Resources Board (CARB) and the Bay Area Air Quality Management District (BAAQMD) relative to the permitting of the Pittsburg District Energy Facility and Delta Energy Center projects under the Clean Air Act would have a disparate impact on the basis of race and national origin, and that CARB and BAAQMD discriminated on the basis of race and national origin by failing to identify disparately impacted populations, like Pittsburg's, and to provide appropriate mitigation.

As discussed in more detail below, and in the enclosed letters to CARB and BAAQMD, OCR found that BAAQMD's and CARB's implementation of specific programs and activities, as well as commitments they have made to OCR over the last few months, have resulted in significant changes in the overall circumstances since the filing of the complaint. In light of these actions, OCR finds insufficient evidence of current non-compliance with Title VI or EPA's Title VI regulation. As such, OCR is closing the complaint as of the date of this letter.

¹ Consistent with EPA's regulations, OCR offered the Complainants and BAAQMD the opportunity to pursue a resolution using alternative dispute resolution. From 2001 to 2003, the Complainants and BAAQMD participated in EPA-funded ADR. However, the ADR process was not successful.

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Background

The two facilities mentioned in the complaint are the Delta Energy Center (DEC) and the Los Medanos Energy Center (LMEC), and are located in Pittsburg, California. DEC is an 880 MW natural gas-fired combined-cycle power plant that has been in operation since May 2002. LMEC is a 555 MW natural gas-fired combined-cycle cogeneration facility that has been in operation since July 2001.

OCR found that both power plants operate under federally-enforceable operating permits requiring the use of selective catalytic reduction (SCR) and low-nitrogen oxides (NOx) burners to control emissions of nitrogen oxides. In addition, both facilities' emissions of NOx, carbon monoxide (CO), particulate matter, volatile organics and ammonia are measured using continuous emissions monitoring systems (CEMS) and/or periodic source testing. Both facilities' NOx and CO CEMS are subject to the federal Acid Rain program's rigorous calibration and quality assurance procedures found in 40 CFR Part 64.

There has not been a significant change in permitted emissions from the DEC facility since the initial title V permit was issued under the Clean Air Act.² With respect to LMEC, there has been no significant change in permitted emissions or equipment at the facility since the last reopening of the permit in 2004.³ In May 2008, BAAQMD approved a revision to the Title V permit that lowered the permitted particulate emissions rates from the facility to reflect actual source test information.⁴

BAAQMD

OCR examined the actions BAAQMD has taken over the last several years and found BAAQMD statements that reflect that, even with overall improvements in regional air quality, there were still locations in the Bay Area where air pollution levels remained relatively high, especially near localized emissions sources. In addition, BAAQMD's measurement sites still sometimes recorded episodes at levels above state and federal standards. BAAQMD also concluded that some Bay Area communities, including those with higher populations of racial or ethnic minorities that suffer poorer health, had less access to healthcare and may have been more vulnerable to the adverse health consequences of air pollution than others. Therefore, in 2004, BAAQMD initiated the *Community Air Risk Evaluation* (CARE) program to intensify efforts to

² More detail can be found in the BAAQMD DEC 4/2011 Title V permit renewal statement of basis on page 4 (found at http://www.baaqmd.gov/~media/files/engineering/title-v-permits/b2095/b2095_2011-4_renewal-sob_03.pdf?la=en)

³ The BAAQMD reopened the permit for the limited purposes of: (i) responding to certain issues raised by the United States Environmental Protection Agency in its May 24, 2004, Order Denying In Part And Granting In Part Petition For Objection To Permit ("Order"); (ii) adding three sources to the permit; (iii) removing obsolete conditions; (iv) responding to changes in federal turbine standards since the permit was originally issued; and (v) incorporating certain other minor corrections and changes.

⁴ From the BAAQMD LMEC 4/2011 Title V permit renewal statement of basis on page 4 (found at http://www.baaqmd.gov/~media/files/engineering/title-v-permits/b1866/b1866_2011-5_renewal-sob_03.pdf?la=en)

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reduce air pollution in areas with greatest air pollution burdens and with most vulnerable populations.

In 2009, BAAQMD's CARE program identified six "impacted communities" -- geographic areas in the region that had high pollution levels, as indicated by emissions and concentrations of carcinogenic toxic air contaminants (TAC), and vulnerable populations as indicated by socio-economic factors. Pittsburg was not included at this time as an "impacted community."

Relative to these six impacted communities, BAAQMD took a series of actions aimed at reducing the health impacts in these CARE communities. For example, the initial CARE study found that diesel particulate emissions contributed 85% of the cancer risk in the Bay Area, which supported and validated programs that targeted specific sources and industries with diesel emissions. These programs included incentives specific to regional truck traffic and controls on emissions from port and harbor activities. These controls and programs benefitted the CARE-impacted communities because they were the most exposed to diesel particulate emissions and some other TACs.

OCR found that BAAQMD updated its methodology in 2012 to identify "impacted communities." Rather than using socioeconomic factors to represent vulnerable populations, BAAQMD used recent health records to determine mortality rates and rates of illnesses aggravated by air pollution. In addition, levels of TACs, fine particles (PM_{2.5}), and ozone levels, to which the DEC and LMEC contributed, were also considered. Cancer risks were estimated from modeled TAC concentrations. Areas with higher air pollution levels and worse health outcomes for diseases affected by air pollution were identified as impacted.

OCR also found that, in March 2014, BAAQMD identified seven "impacted communities" using the updated methodology. Two communities were added to the 2009 list and one was removed. One of the communities added was the Pittsburg/Antioch community. The area covered by several previously identified "impacted communities" was expanded. Although socioeconomic factors were not used in the 2014 CARE analysis, once "impacted communities" were identified, BAAQMD investigated the population characteristics of different areas. BAAQMD developed an index to aggregate the health impacts from toxic carcinogens, PM_{2.5}, and ozone.

OCR finds that through its CARE program, BAAQMD has made significant efforts to identify and address areas that have high concentrations of air pollution and populations most vulnerable to air pollution's health impacts. BAAQMD has found that these areas have correlated with areas of significant populations of racial and national origin minorities. The maps of "impacted communities" generated through the CARE program are being integrated into many of BAAQMD's programs to mitigate health impacts in these communities. The maps, along with information about pollutants and their sources, help prioritize a broad array of actions designed to foster healthy communities via the *Clean Air Communities Initiative*. These efforts address particular concerns raised in this complaint regarding whether BAAQMD was identifying

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minority communities disproportionately affected by higher concentrations of air pollution, such as Pittsburg, and providing appropriate mitigation for those communities.

OCR reviewed BAAQMD's April 2014 plan "Improving Air Quality and Health in Bay Area Communities: CARE Program Retrospective and Path Forward." This Plan outlines significant steps BAAQMD will take to improve local air quality in Pittsburg and other "impacted communities." The 2014 Plan states that "...during the next two to three years the CARE program will prioritize developing datasets, tools, and guidance to help communities and planners avoid future air pollution exposures from local sources and to reduce existing exposures. The CARE program will also continue to integrate CARE principles into all Air District functions..." Specific actions the Plan identifies include: (1) prioritizing grant funding for projects that reduce emissions; (2) focusing enforcement activities; (3) developing new and revised regulations that consider source categories contributing to local impacts; (4) providing assistance in developing Community Risk Reduction Plans; (5) focusing outreach and community education and engagement programs; and (6) conducting special studies to measure and model local air pollution impacts. OCR has confirmed that actions discussed and identified in 2014 through this Plan are currently being implemented.

For example, BAAQMD is currently working with the City of Pittsburg to locate a toxics sampler and aethalometer (PM monitor with wood smoke identification capabilities). BAAQMD plans to have the monitor operational by the end of the year. In addition, 10 of the 11 projects selected for BAAQMD's 2016 James Cary Smith Community Grant Program directly involve CARE communities. La Clinica de La Raza, Inc – Escuela de Promotores/Freedom Breathers received one of the grants to improve the respiratory health of Pittsburg residents through outreach, education, and through advocacy efforts which brought community-based monitoring data to the community of Pittsburg.⁵

In light of the changes to BAAQMD's programs and activities, as well as commitments BAAQMD has made during the course of this investigation, including with respect to the Pittsburg community, OCR finds insufficient evidence of current non-compliance with Title VI or EPA's Title VI regulation. OCR highly recommended that BAAQMD make annual update reports on the actions taken to address the air quality concerns in Pittsburg and each of the "impacted communities" readily available to the public on its website and ensure that accurate and reliable information on the air quality in Pittsburg is also readily available.

In addition, during the course of the investigation, OCR reviewed BAAQMD's compliance with the requirements of 40 C.F.R. Part 7, Subpart D, which form the foundational elements of a recipient's non-discrimination program. These include: continuing notice of non-discrimination under 40 C.F.R. § 7.95; adoption of grievance procedures that assure the prompt and fair resolution of complaints alleging civil rights violations under 40 C.F.R. § 7.90; and the designation of at least one person to coordinate its efforts to comply with its non-discrimination obligations under 40 C.F.R. § 7.85(g).

⁵ <http://www.baaqmd.gov/grant-funding/residents/community-grants-program/2016-community-grant-awards>.

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OCR also reviewed the programs, policies, and guidance BAAQMD is implementing to ensure it provides meaningful access by persons with limited English proficiency and persons with disabilities in all its programs and activities that receive federal financial assistance from EPA, including its public participation process. In September 2015, when EPA began discussions with BAAQMD, OCR found that BAAQMD already had in place a policy to ensure those with limited English proficiency are provided meaningful access to BAAQMD's programs and activities called "Assessment of Limited English Proficient Populations and Current Services."⁶ However, other components of BAAQMD's non-discrimination program were missing. Since that time, OCR has provided technical assistance to BAAQMD as it developed the other components of its non-discrimination program.

BAAQMD now has a notice of non-discrimination called "Accessibility and Non-Discrimination Policy" (Non-Discrimination Policy) which can be accessed on BAAQMD's website at <http://www.baaqmd.gov/about-the-air-district/accessibility>. The Non-Discrimination Policy not only provides notice that BAAQMD does not discriminate on the basis of race, color, national origin, age, disability, and sex, but provides notice of services available for those with disabilities. The Non-Discrimination Policy also identifies the Non-Discrimination Coordinator as the point of contact for questions about filing a complaint or about the Non-Discrimination Policy. Those interested in filing complaints are currently directed to contact the Non-Discrimination Coordinator. The website will also include a link to learn how and where to file a complaint of discrimination.

By August 1, 2016, BAAQMD will translate its Non-Discrimination Policy into target languages and these will be available on its website and in hard copy. It will also be in a version accessible to persons with disabilities on the website and upon request to anyone requesting information in a format not already provided as described at no cost to the requester.

BAAQMD has posted its Non-Discrimination Policy in electronic format (*i.e.*, scrolling informational publicly accessible monitor) near the front door of its building. BAAQMD will insert the Non-Discrimination Policy in its annual report and in future annual reports and in publicly available publications as they are updated.

BAAQMD has also adopted a grievance procedure that is contained in BAAQMD's "Non-Discrimination Policy and Complaint Process" (Complaint Process) that provides complainants a prompt and impartial investigation of, and response to, complaints filed with BAAQMD alleging discrimination in BAAQMD's programs or activities prohibited by the federal non-discrimination statutes. By August 1, 2016, BAAQMD will translate its Complaint Process into target languages and these will be available online and in paper formats.

⁶<http://www.baaqmd.gov/~media/Files/Communications%20and%20Outreach/Community%20Outreach/Community%20Language%20Assessment/LEP%20Report%20111510.ashx>

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OCR has confirmed that BAAQMD's Non-Discrimination Coordinator will carry out a number of important responsibilities. The Non-Discrimination Coordinator's responsibilities include coordination of grievance procedures; tracking all complaints filed with BAAQMD under federal non-discrimination statutes, including any patterns or systemic problems; updating complainants on the progress of their complaints filed with BAAQMD under federal non-discrimination statutes, and any determinations made; conducting periodic evaluations of the efficacy of BAAQMD's efforts to provide services, aids, benefits, and opportunities for participation in any of BAAQMD's programs or activities without regard to race, national origin, color, sex, disability, age, or prior opposition to discrimination; providing information internally and externally regarding rights to services, aids, benefits, and participation without regard to race, national origin, color, sex, disability, age, or prior opposition to discrimination; providing appropriate training for BAAQMD employees on the non-discrimination policies and procedures and obligations to comply with federal non-discrimination statutes; and establishing grievance policies and procedures or mechanisms (*e.g.*, an investigation manual).

While BAAQMD has a detailed Public Participation Plan that describes how BAAQMD works to engage persons with limited English proficiency and explains different ways for residents to express concerns, questions, and comments, it fails to provide guidance as to how those with disabilities may participate in BAAQMD public involvement activities. BAAQMD will address the absence of information in the Public Participation Plan regarding access for those with disabilities by providing the Accessibility and Non-Discrimination Policy which does provide that information on accessibility for those with disabilities through language contained in board meeting agendas, publications, front door notifications, and the website. OCR recommended that the next time BAAQMD updates its Public Participation Plan that BAAQMD include appropriate provisions for those with disabilities.

CARB

OCR looked at the relationship between CARB and BAAQMD, actions CARB and BAAQMD have taken relative to the concerns raised through this complaint, and CARB's implementation of the non-discrimination program required pursuant to EPA's regulations found at 40 C.F. R. Part 7. OCR found that in California, the California legislature has assigned responsibility for regulation of mobile sources of air pollution, among other duties, to CARB. With respect to stationary source regulation, including new source review permitting, OCR found that the California legislature assigned that responsibility to county and regional air pollution control districts such as BAAQMD. CARB retains oversight authority to monitor the performance of air district programs and may assume authority to conduct District functions if the District fails to meet certain responsibilities.

OCR found that CARB was not directly involved in the permitting of the two facilities named in the complaint. Moreover, OCR found that CARB has focused on reducing diesel particulate emissions which are a large contributor to cancer risk in CARE impacted communities and in Pittsburg in particular, and has committed to do so in the future. OCR found that CARB developed a 14-point program, the Diesel Risk Reduction Plan, to reduce diesel emissions in the

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next decade. This plan will retrofit new and existing engines with PM filters to reduce emissions. A major component of the plan calls for extensive use of low sulfur diesel fuel. California has also invested in a number of incentive programs to help the owners of diesel engines upgrade or replace them with cleaner-burning alternatives, such as compressed natural gas or electric-powered technology. For these reasons, OCR finds insufficient evidence of current non-compliance with Title VI or EPA's Title VI regulation.

In addition, during the course of the investigation, OCR reviewed CARB's compliance with the requirements of 40 C.F.R. Part 7, Subpart D. OCR also reviewed the programs, policies, and guidance CARB is implementing to ensure it provides meaningful access by persons with limited English proficiency and persons with disabilities in all its programs and activities that receive federal financial assistance from EPA, including its public participation process.

OCR found that CARB already had in place a Bilingual Services Program⁷ to ensure that persons with limited English proficiency are provided meaningful access to CARB's programs and activities. Similarly, OCR found that CARB had a policy in place to ensure that its programs, activities and services are accessible to persons with disabilities.⁸ In April 2016, when OCR began discussions with CARB, OCR learned that CARB had also recently implemented a non-discrimination policy and grievance procedure. Since that time, OCR has provided technical assistance to CARB to improve the elements of its non-discrimination program.

CARB now has a notice of non-discrimination called "Civil Rights Policy and Discrimination Complaint Process" which can be accessed on CARB's website at <http://www.arb.ca.gov/eo/civil-rights-policy.htm>. The Civil Rights Policy provides notice that CARB does not discriminate on the basis of race, color, national origin, age, disability, and sex. The Civil Rights Policy also identifies the Civil Rights Officer as the point of contact for questions about filing a complaint or about the Civil Rights Policy. CARB has also adopted a grievance procedure that is contained in the Civil Rights Policy and Discrimination Complaint Process that provides complainants a prompt and impartial investigation of and response to complaints filed with CARB alleging discrimination in CARB's programs or activities prohibited by the federal non-discrimination statutes. Those interested in filing complaints are directed to CARB's "Civil Rights Complaint Form" which also can be accessed on CARB's website at <http://www.arb.ca.gov/eo/civil-rights-policy.htm>.

CARB will translate its Civil Rights Policy and Discrimination Complaint Process into target languages to be made available on its website and in hard copy beginning with Spanish by June 17, 2016. It will also be in a version accessible to persons with disabilities on the website and upon request to anyone requesting information in a format not already provided as described at no cost to the requester. CARB has posted its Civil Rights Policy in the Visitor's Center of its building. CARB will insert the Civil Rights Policy in its annual report and in future annual reports and in publicly available publications as they are updated.

⁷ <http://www.arb.ca.gov/eo/bilingual-services-complaints.htm>

⁸ <http://www.arb.ca.gov/html/ada/ada.htm>

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OCR has confirmed that CARB's Civil Rights Officer will carry out a number of important responsibilities. The Civil Rights Officer's responsibilities include coordination of grievance procedures; tracking all complaints filed with CARB under federal non-discrimination statutes including any patterns or systemic problems; updating complainants on the progress of their complaints filed with CARB under federal non-discrimination statutes and any determinations made; conducting periodic evaluations of the efficacy of CARB's efforts to provide services, aids, benefits, and opportunities for participation in any of CARB's programs or activities without regard to race, national origin, color, sex, disability, age or prior opposition to discrimination; providing information internally and externally regarding rights to services, aids, benefits, and participation without regard to race, national origin, color, sex, disability, age or prior opposition to discrimination; providing appropriate training for CARB employees on the non-discrimination policies and procedures and obligations to comply with federal non-discrimination statutes; and establishing grievance policies and procedures or mechanisms (e.g., an investigation manual).

This letter sets forth OCR's disposition of your complaint. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such.

OCR appreciates your concern for the health of people in communities that may be most impacted by, and most vulnerable to, the effects of air emissions. If you have any questions regarding this letter, please feel free to contact me at Dorka.Lilian@epa.gov or Katsumi Keeler at keeler.katsumi@epa.gov or at (202) 564-2347.

Sincerely,



Lilian S. Dorka
Deputy Director, Interim Director
Office of Civil Rights

Cc:

Deborah Jordan
Deputy Regional Administrator
Acting Deputy Civil Rights Official

Elise Packard
Associate General Counsel
for Civil Rights and Finance